United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-7039

UNITED STATES COURT OF APPEALS

FOR THE SECOND JUDICIAL CIRCUIT

DOCKET NUMBER 76-7039 B P/S

BISWANATH HALDER,

PLAINTIFF APPELLANT.

V

AVIS RENT-A-CAR SYSTEM, INCORPORATED,

DEFENDANT-APPELEE.

BRIEF AND APPENDIX

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

FROM THE DENIAL OF A PRILIMINARY INJUNCTIO

BISWANATH HALDER

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PAGINATION AS IN ORIGINAL COPY

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ISSUE PRESENTED

THE TRIAL JUDGE HAS ABUSED HIS DISCRETION IN DENYING THE PLAINTIFF/APPELLANT'S MOTION FOR A PRELIMINARY INJUNCTION, DESPITE THE FACT THAT THE PLAINTIFF/APPELLANT HAS MORE THAN SATISFIED THE FOUR PREREQUISITES NECESSARY FOR THE ISSUANCE OF SUCH AN INJUNCTION.

FACTS

THE APPELLANT WAS BORN IN INDIA, OF INDIAN PARENTAGE. HE HOLDS A BACHELO DEGREE IN ELECTRICAL ENGINEERING FROM THE UNIVERSITY OF CALCUTTA. HE IMMIGRATE TO THIS GREAT COUNTRY ON MAY 31, 1969.

PRIOR TO COMING TO THE UNITED STATE HE HAD GAINED TWO YEARS OF EXPERIENCE IN COMPUTER SOFTWARE WITH TWO REPUTED COMPUTER MANUFACTURERS IN ENGLAND. HE WAS ADMITTED TO THE UNITED STATES AS AN ALIEN WHO IS A MEMBER OF A PROFESSION FOR WHICH THERE IS AN AVAILABLE MARKET FOR HIS PROFESSIONAL SERVICES. 8 USCA 1153(a)(3).

EVER SINCE THE APPELLANT LANDED IN THE LAND OF OPPORTUNITY, HE HAS BEEN LOOKING FOR A JOB.

THE APPELLANT FILED CHARGES OF.

DISCRIMINATION WITH THE EQUAL EMPLOYME OPPORTUNITY COMMISSION (EEOC) ON MAY 10 1971, CHARGING THE APPELLEE, AVIS REN A-CAR SYSTEM, INC. (AVIS), WITH DISCRIMINATION AGAINST HIM BECAUSE OF HIS NATIONAL ORIGIN. THE EEOC ISSUED A NO-CAUSE DETERMINATION ON OR ABOUT FEBRUARY 2, 1973. THEREAFTER, THE APPELLANT REQUESTED AND RECEIVED A NOTICE OF RIGHT-TO-SUE AVIS ON SEPTEMBE 7, 1974. SUBSEQUENT TO RECEIPT OF THE NOTICE OF RIGHT-TO-SUE, THE APPELLANT COMMENCED THE INSTANT ACTION AGAINST THE APPELLEE ON NOVEMBER 7, 1974, BY FILING A COMPLAINT AT THE UNITED STATE DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

IN THE COMPLAINT THE APPELLANT CHARGED THAT THE APPELLEE DENIED HIM EQUAL EMPLOYMENT OPPORTUNITIES AS PROVIDE

BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 42 USCA 2000e et seq., BASED ON ITS FAILURE OR REFUSAL TO HIRE HIM AS A PROGRAMMER/ ANALYST BECAUSE OF HIS NATIONAL ORIGIN.

SUBSEQUENTLY, THE APPELLANT MADE A MOTION, PURSUANT TO RULE 15(a) OF THE F.R.CIV.P., FOR LEAVE TO FILE AN AMENDED COMPLAINT, RETURNABLE JANUARY 17, 1975, TO INCLUDE AND ENUMERATE FOUR SPECIFIC DATES FROM 1970 TO 1974, WHEN HE WAS DENIED EMPLOYMENT BY AVIS AFTER APPLYING TO ITS WORLD HEADQUARTE AT GARDEN CITY, NEW YORK. THE SAID MOTION WAS GRANTED BY JUDGE MISHLER ON FEBRUARY 25, 1975.

IN THE INTERIM, ON FEBRUARY 3, 1975 THE APPELLANT SERVED A SET OF NINE INTERROGATORIES, PURSUANT TO RULE 33(a)

OF THE F.R CIV. P., ON THE COUNSEL FOR THE APPELLEE. SUBSEQUENTLY, THE APPELLEE RESPONDED BY PROVIDING COMPLET RESPONSES TO INTERROGATORIES 1, 2 & 3, PARTIAL RESPONSE TO INTERROGATORY 7, AND OBJECTED TO INTERROGATORIES 4, 5, 6, 8 & 9, ON THE GROUNDS THAT THE INFORMATION SOUGHT IS NOT CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE, THAT THEY ARE IRRELEVANT, AND THAT THEY ARE OPPRESSIVE AND BURDENSOME.

THE APPELLANT THEN MADE A MOTION, PURSUANT TO RULE 37(a) OF THE F.R CIV.P. TO COMPEL THE APPELLEE TO ANSWER INTERROGATORIES 4 THROUGH 9, ON THE GROUND THAT FAILURE TO ANSWER THEM WER WITHOUT SUBSTANTIAL JUSTIFICATION. ON JUNE 13, 1975, JUDGE MISHLER DIRECTED THE APPELLEE TO GIVE PARTIAL ANSWER TO INTERROGATORY 8, AND DENIED THE APPELLAN

MOTION TO COMPEL ANSWERS TO INTERROGATORI
6, 5, 6, 7 & 9 IN ALL RESPECTS.

IMMEDIATELY THEREAFTER, THE APPELLANT MADE A MOTION, PURSUANT TO RULE 9(m) OF THE GENERAL RULES FOR THE EASTERN DISTRICT OF NEW YORK, FOR AN ORDER GRANTING HIM LEAVE TO REARGUE HIS MOTION TO COMPEL THE APPELLEE TO ANSWER ALL THE INTERROGATORIES ON THE GROUND THAT OPEN DISCLOSURE OF ALL POTENTIALLY RELEVANT INFORMATION IS THE KEYNOTE OF DISCOVERY PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE.

THE APPELLANT, IN THE INTERIM, ON MAY 27, 1975, MADE A MOTION, PURSUANT TO RULE 15(a) OF THE F.R. CIV.P., TO AMEND HIS COMPLAINT FOR THE SECOND TIME TO INCLUDE A CAUSE OF ACTION UNDER THE CIVIL RIGHTS ACT OF 1866, AS AMENDED BY THE ENFORCEMENT ACT OF

1870, 42 USCA 1981, AS WELL AS TO ADD COLOR, RELIGION, AND ALIENAGE AS GROUND OF DISCRIMINATION.

THEREAFTER, ON AUGUST 1, 1975, THE APPELLEE MOVED TO DISMISS THE ACTION, PURSUANT TO RULES 12(b) & (c) OF THE F.R.CIV AND FOR SUMMARY JUDGMENT, PURSUANT TO RULE 56(b) OF THE F.R. CIV. P., ON THE GROUNDS THAT THE COURT LACKED JURISDICTIO OVER THE SUBJECT MATTER OF THIS ACTION, THAT THE APPELLANT FAILED TO COMMENCE THE ACTION WITHIN THE TIME LIMITED BY LAW, AND THAT THE COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

THE APPELLANT THEN CROSS MOVED FOR SUMMARY JUDGMENT, PURSUANT TO RULE 56(a) OF THE F.R. CIV P., ON THE GROUND THAT NO GENUINE ISSUE OF ANY MATERIAL FACT EXISTED, AND THAT THE APPELLANT WAS

ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

INSPITE OF TITLE VII REQUIREMENT THAT A CASE BE DISPOSED OF AT THE EARLIEST, THIS CASE HAD BEEN PENDING FOR MORE THAN A YEAR, AND SORVIVAL BECAME DIFFICULT FOR THE APPELLANT ON ECONOMIC GROUNDS

SINCE THE COURT HAS AMPLE POWER, PURSUANT TO 42 USCA 2000e - 5(6)(1), TO GRANT TEMPORARY AFFIRMATIVE RELIEF, THE APPELLANT, ON NOVEMBER 17, 1975, MADE A MOTION, PURSUANT TO RULE 65(a) OF THE F R CIV. P., FOR A PRELIMINARY INJUNCTI PENDING THE FINAL HEARING AND DETERMINATION OF THIS CAUSE FOR A PERMANENT INJUNCTION, ENJOINING THE UNLAWFUL EMPLOYMENT POLICIES AND PRACTICES OF THE DEFENDANT IN DENYING EMPLOYMENT TO THE APPELLANT AS A

PROGRAMMER/ ANALYST BECAUSE OF HIS COLOR, RELIGION, NATIONAL ORIGIN, AND ALIENAGE.

ON JANUARY 22, 1976, JUDGE MISHLER DENIED IN ALL RESPECTS ALL MOTIONS BY PLAINTIFF/ APPELLANT AND DEFENDANT/ APPELLEE, INCLUDING PLAINTIFF/APPELLANT MOTION FOR A PRELIMINARY INJUNCTION.

ARGUMENT

IT IS A WELL-ESTABLISHED DOCTRINE THAT AN APPLICATION FOR A PRELIMINARY INJUNCTION IS ADDRESSED TO THE SOUND DISCRETION OF THE TRIAL JUDGE. BROWN V CHOTE, 1973, 411 U.S. 452, 93 S Ct. 1732; DECKERT V INDEPENDENCE SHARES CORPORATION, 1940, 311 U.S. 282. 61 S Ct. 229; UNITED STATE V CORRICK, 1936, 298 U S 435, 56 S Ct. 829; NATIONAL FIRE INSURANCE COMPANY V THOMPSO 1930, 281 U.S. 331. 50 S.Ct. 288; ALABAMA V UNITED STATES, 1929, 279 U S 229, 49 S.Ct. 26 UNITED FUEL GAS COMPANY V PUBLIC SERVIC COMMISSION, 1929. 278 U.S. 322, 49 S.Ct 157; FARRINGTON V T TOKUSHIGE. 1927. 273 U.S. 28 47 S.Ct. 406; CHICAGO GREAT WESTERN RAILWAY V KENDALL, 1926. 266 U.S. 94, 45 S Ct. 55; PRENDERGAST V NEW YORK TELEPHON COMPANY, 1923, 262 U.S 43, 43 S Ct. 466;

MECCANO, LIMITED V JOHN WANAMAKER, 1920 253 U.S. 136, 40 S.Ct. 463.

BUT SUCH A DISCRETIONARY CHOICE IS NOT LEFT TO A JUDGE'S "INCLINATION, BUT TO [HIS] JUDGMENT; AND [HIS] JUDGMENT IS TO BE GUIDED BY SOUND LEGAL PRINCIPLES." UNITED STATES V BURR, 1807, 25 FED. CAS. NO. 14,692d, PP. 30, 35.

THAT THE JUDGE'S DISCRETION IS EQUITABLE IN NATURE, SEE CURTIS V LOETHE 1924, 615 U.S. 189, 193, 94 S.Ct. 1005, 1010, "HARDLY MEANS THAT IT IS UNFETTERED BY MEANINGFUL STANDARDS OR SHIELDED FROM THOROUGH APPELLATE REVIEW." ALBEMARLE PAPER COMPANY V MOODY, 1975, 422 U.S. 405, 416 95 S.Ct. 2362, 2371.

IF THE TRIAL JUDGE ABUSES HIS DISCRETION IN THE PLAINTIFF/APPELLANT'S APPLICATION FOR A PRELIMINARY INJUNCTION, HIS DECISION SHOULD BE REVERSED.

WHEN JUDGE MISHLER CAME OUT OF LA
SCHOOL, IF HE WOULD HAVE APPLIED TO
ANY MAJOR LAW FIRM IN THE UNITED STATE
FOR A JOB, SURMISING FROM HIS NAME,
THEY WOULD HAVE REJECTED HIS APPLICATIO
IMMEDIATELY (SEE MEMORANDUM OF DECISION
AND ORDER DATED 01-22-1976, PAGE 7).

BUT THE JUDGE HAS CONVENIENTLY
IGNORED THE FACT THAT THE APPELLANT
HAS VERY SPECIFICALLY INCLUDED HIS
NATIONAL ORIGIN, CITIZENSHIP, AND VISA
STATUS IN HIS RESUME. HALDER AFFIDAVI
OF 08-25-1975, EXHIBIT A.

CONTRARY TO THE JUDGE'S ASSERTION
THE APPELANT HAS IN FACT OFFERED THEORY
HOW THE APPELLEE COULD AND SHOULD BE
ABLE TO ASCERTAIN THE APPELLANT'S COLO
AND RELIGION FROM HIS RESUME. HALDER
AFFIDAVIT OF 08-25-1975, PAGES 2&3, PARA
(SEE MEMORANDUM OF DECISION AND ORDER

DATED 01-22-1976, PAGE 3).

THE APPELANT NEVER ASSERTED THAT "HE POSSESSED SKILLS WHICH ARE BADLY NEEDED HERE." HE NEVER CLAIMED THAT "HE WAS EMINENTLY QUALIFIED TO FILL" THE POSITIONS THE APPELLEE ADVERTISED (SEE MEMORANDOM OF DECISION AND ORDER DATED 01-22-1976, PAGE 6).

THE APPELLANT NEVER USED THE ADVERB "BADLY" BEFORE NEEDED. HE NEVER USED THE ADVERB "EMINENTLY" BEFORE THE WORD QUALIFIED.

ALL THAT HE SAID WAS THAT SINCE "THE LABOR DEPARTMENT CERTIFIED THAT [HIS] SKILLS ARE NEEDED IN THIS COUNTRY — A FACT SUBSTANTIATED BY THE THOUSANDS OF ADVERTISEMENTS INSERTED REGULARLY IN THE PRESS — THE DENIAL OF EMPLOYMENT TO [HIM] MUST BE BASED ON GROUNDS EXTRANEOU TO HIS PROFESSIONAL MERIT." AMENDED

COMPLAINT, PAGE 6, PARA 9.

ALL THAT THE APPELLANT EVER SAID WAS THAT HE WAS QUALIFIED FOR THE JOB HE SOUGHT.

THE APPELLANT IS NOT A GENIOUS. HE MAY AGAIN RESPECTFULLY POINT OUT THAT HE HOLDS A BACHELOR'S DEGREE IN ELECTRICAL ENGINEERING FROM THE UNIVERSITY OF CALCUTTA, AND BEFORE HE ENTERED THE UNITED STATES, HE WROTE DIAGNOSTIC PROGRAMS — PROGRAMS TO DIAGNOSE COMPUTER MALFUNCTIONG — FOR TWO YEARS WITH TWO OF THE FIVE LARGEST COMPUTER MANUFACTURERS OF THE WORLD. AND THE U.S. GOVERNMENT GRANTED HIM AN IMMIGRANT VISA ON THE RECOGNITION OF HIS QUALIFICATIONS. 8 USCA 1153(6)(3).

THE PERIOD IN WHICH THE APPELLANT HAS BEEN SEEKING EMPLOYMENT WITH THE APPELLEE, THE LATTER HAS BEEN DESPERATE

TRYING TO RECRUIT COMPUTER PROGRAMMERS. HALDER AFFIDAVIT OF 08-25-1975, PAGES 14, 15 & 16, PARA 6(B). AND ALTHOUGH HIS QUALIFICATIONS ERFECTLY MATCH THE JOB REQUIREMENTS — PROFICIENCY IN ASSEMBLY LANGUAGE AND ALSO EXPERIENCE IN MINI-COMPUTERS AND IBM SYSTEM 360 — HE WAS NEVER CONSIDERED FOR A JOB. HALDE AFFIDAVIT OF .08-25-1975, PAGES 26-27, PARA 6(J) & (K).

THE APPELLANT HAS ESTABLISHED IN HIS CROSS-MOTION FOR SUMMARY JUDGMENT, BEYON ANY CHALLENGE FROM THE APPELLEE, THAT SUCCESS ON THE MERITS IS A VIRTUAL CERTAINTY, RATHER THAN A PROBABILITY.

BUT JUDGE MISHLER CANNOT SAY THAT THE APPELLEE'S INTERPRETATION — THAT THERE WERE POSITIONS AVAILABLE, BUT THOSE POSITIONS REQUIRED SKILLS THAT THE APPELLANT DID NOT HAVE — IS MOR

WORTHY OF BELIEF THAN THAT OF THE APPELLANT'S, THAT HE WAS QUALIFIED FOR THE JOB HE SOUGHT (SEE MEMORANDUM OF DECISION AND ORDER DATED 01-22-1976, PAGE 7).

THE APPELLEE'S CONTENTION IS BASED ON THE AFFIDAVIT OF ITS EMPLOYMENT MANAGER, DANIEL P. MCCONNELL, SWORN TO ON JULY 31, 1975. DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION, PAGE 4.

THE APPELLANT HAS UNEQUIVOCALLY POINTED OUT IN HIS CROSS-MOTION FOR SUMMARY JUDGMENT THAT DANIEL P. MCCONNEL IS A NOTORIOUS PERJURER. 18 USCA 1623. HALDER AFFIDAVIT OF 08-25-1975, PAGES 23-27, PARAS 6(I)-(K).

THE EMPLOYMENT MANAGER OF A MULTI-MILLION AND MULTI-NATIONAL AMERICAN CORPORATION CAN COMMIT INNUMERABLE

PERJURIES, AND THEY ARE QUITE "WORTH OF BELIEF" TO FEDERAL JUDGE JACOB MISHLER.

ALTHOUGH "FROM ITS FOUNDING THE NATION'S BASIC COMMITMENT HAS BEEN TO FOSTER THE DIGNITY AND WELL-BEING OF ALL PERSONS WITHIN ITS BORDERS," GOLDBER V KELLY, 1970, 397 U.S. 254, 264-5, 90 S CT. 1011, 1019, YET JUDGE MISHLER'S DECISION PROVES THAT EVERYBODY IS NOT EQUAL UNDE LAW — THE POOR MAN HAS NO JUSTICE. RICH CORPORATIONS CAN GET AWAY UNPUNISHED WITH ANY AMOUNT OF UNLAWFU ACTS.

JUDGE MISHLER ALSO NOTED THAT "THE PRELIMINARY INJUNCTION IS OFTEN USED TO MAINTAIN THE STATUS QUO PENDING FINAL DECISION ON THE MERITS" (SEE MEMORANDUM OF DECISION AND ORDER DATED 01-22-1976, PAGE 7).

THE APPELLANT HAS MENTIONED QUITE A NUMBER OF CASES IN HIS MEMORANDUM OF LAW DATED 11-17-1975, WHERE TRIAL JUDGES HAVE ISSUED PRELIMINARY INJUNCTIO — NOT TO MAINTAIN THE STATUS QUO. BU WHERE THE PLAINTIFFS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS COUPLED WITH POSSIBILITY OF IRREPARABL HARM IF THE INJUNCTIONS WERE DENIED.

THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION AS LAID DOWN BY THE SUPREME COURT IN OHIO OIL COMPANY V CONWAY, 1929, 279 U.S 813, 815, 49 S Ct. 256, 257, DOES NOT CALL FOR PRESERVATION OF STATUS QUO.

ALSO CIRCUIT JUDGES MILLER, BAZELON AND BURGER IN ESTABLISHING THE FOUR PREREQUITES FOR A PRELIMINARY INJUNCTION HAVE NEVER MENTIONED THAT A PRELIMINARY INJUNCTION IS ISSUED TO PRESERVE THE

STATUS QUO. VIRGINIA PETROLEUM JOBBER ASSOCIATION V FPC, 259 F 2d 921, CA DC 19

THE ABCVE STANDARDS FOR A PRELIMINARY INJUNCTION HAVE BEEN ADOPTED BY ALMOST EACH CIRCUIT INCLUDING THIS ONE IN EASTERN AIR LINES V CAB, 261 F. 2d 830, CA 2 1958.

EVEN IF JUDGE MISHLER'S CONTENTION IS TRUE, "IT IS NOT UNCOMMON FOR FEDERAL COURTS TO FASHION FEDERAL LAW WHERE FEDERAL RIGHTS ARE CONCERNED." TEXTILE WORKERS UNION V LINCOLN MILLS 1957. 353 U.S 448, 457, 77 S Ct. 912, 918

FURTHER, JUDGE MISHLER BELIEVES THAT IF THE "PLAINTIFF EVENTUALLY PROVES HIS CLAIMS, MONEY DAMAGES PLUS APPROPRIA AFFIRMATIVE RELIEF AT THAT POINT IN TIME WILL REDRESS ANY WRONGS DONE TO PLAINTIFF" (SEE MEMORANDUM OF DECISIO AND ORDER DATED 01. 22. 1976. PAGES 7&8).

IN THE FIRST PLACE, THE PLAINTIFF/ APPELLANT CARIES THE INITIAL BORDEN OF ESTABLISHING A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION. THE BORDEN THEN SHIFTS TO THE DEFENDANT/ APPELLEE TO ARTICULATE SOME LEGITIMATE, NONDISCRI- MINATORY REASON FOR THE PLAINTIFF/ APPELLANT'S REJECTION. MCDONNELL DOUGLAS CORPORATION V GREEN, 1973, 411 U.S. 792, 802 93 S.Ct. 1817, 1824.

JUDGE MISHLER AGAIN CONVENIENTLY IGNORED THE FACT THAT TITLE VII PROHIBITS DISCRIMINATION NOT ONLY WITH RESPECT TO COMPENSATION BUT ALSO WITH RESPECT TO TERMS CONDITIONS, AND PRIVILEGES OF EMPLOYMENT. DISCRIMINATION WITH RESPECT TO TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT MAY BE DIFFICULT, IF NOT IMPOSSIBLE TO COMPENSATE WITH MONEY DAMAGES. HALDER AFFIDAVIT OF 12:15. 1975.

PAGE 10.

MOREOVER, THE APPELLANT WAS ADMITTE TO THE UNITED STATES AS A MEMBER OF A PROFESSION FOR WHICH THERE IS AN AVAILABLE MARKET FOR HIS PROFESSIONAL SERVICES. 8 USCA 1153(a)(3). CONSEQUENTLY HE HAS AN INDISPUTABLE RIGHT TO PURSUE HIS CHOSEN PROFESSION, AND THEREBY PROTECT HIS PROFESSIONAL REPUTATION. THE LATITUDE PERMITTED BY THE FREE ENTERPRI SYSTEM TO THE APPELLEE SHOULD NOT CA FOR THE SACRIFICE OF THE APPELLANT'S PROFESSIONAL FUTURE. HALDER AFFIDAVIT OF 12-15-1975, PAGE 9

42 USCA 2000e-5(b)(5) REQUIRES THE CASE TO BE ASSIGNED FOR HEARING AT THE EARLIEST PRACTICABLE DATE, AND TO CAUSE THE CASE TO BE IN EVERY WAY EXPEDITED. THE TRIAL SHOULD BE SCHEDULED WITHIN 120 DAYS AFTER THE

ISSUE HAS BEEN JOINED. HALDER AFFIDAV
OF 11-17-1975, PAGES 3 & 4, PARA 4.

IT HAS BEEN MORE THAN 20X120 DAY
SINCE THE APPELLANT STARTED LOOKING
FOR EQUAL EMPLOYMENT OPPORTUNITY IN
THE LAND OF OPPORTUNITY, AND MORE
THAN 3X120 DAYS SINCE HE SOUGHT
JUDICIAL RELIEF FOR DENIAL OF EQUAL
EMPLOYMENT OPPORTUNITY. IN THE MEANTIME
SURVIVAL HAS BECOME A CRITICAL
PROBLEM FOR THE APPELLANT SINCE
HIS SURVIVAL DEPENDS ON HIS HAVING
A JOB, PROLONGED UNEMPLOYMENT MIGHT
EVENTUALLY CAUSE THE SEPARATION OF
HIS BODY AND SOUL.

"THE PURPOSE AND PROCEDURES OF TITL
VII INDICATE THAT CONGRESS INTENDED
FEDERAL COURTS TO EXERCISE FINAL RESPONSI
BILITY FOR ENFORCEMENT OF TITLE VII ...
ALEXANDER V GARDNER-DENVER COMPANY, 1974

415 U.S. 36, 56, 94 S.Ct. 1011, 1023.

IT IS CLEAR FROM THE FORFGOING AND ALSO FROM THE HALDER AFFIDAVITS OF 08-25-1975, 11 17 1975 & 12 15-1975, THAT JUDG MISHLER HAS ABUSED HIS DISCRETION IN DENYING THE PLAINTIFF/APPELLANT'S APPLICATIO FOR A PRELIMINARY INJUNCTION, ENJOINING THE UNLAWFUL EMPLOYMENT POLICIES AND PRACTICES OF THE DEFENDANT IN DENYING EMPLOYMENT TO THE PLAINTIFF/APPELLANT AS A PROGRAMMER/ANALYST BECAUSE OF HIS COLOR, RELIGION, NATIONAL ORIGIN, AND ALIENAGE

THE APPELLEE IS VIOLATING THE CIVI RIGHTS ACTS. HALDER AFFIDAVIT OF 08-25-1975. THEREFORE, A PRELIMINARY INJUNCTION WOULD SERVE THE PUBLIC INTEREST AS MUCH AS [THE APPELLANT'S] PRIVATE INTERESTS IN THIS REGARD, BY ASSERTING THESE CLAIMS, [THE APPELLANT]

IS ASSOMING A DOAL ROLE, INCLUDING THAT OF A PRIVATE ATTORNEY GENERAL. SINCE IT IS IMPOSSIBLE AS A PRACTICAL MATTER FOR THE GOVERNMENT TO SEEK OUT AND PROSECUTE EVERY IMPORTANT VIOLATION OF LAWS DESIGNED TO PROTECT THE PUBLIC IN THE AGGREGATE, PRIVATE ACTIONS BROUGHT BY MEMBERS OF THE PUBLIC . . INCIDENTALLY BENEFIT THE GENERAL PUBLIC INTEREST [AND] PERFORM A VITAL PUBLIC SERVICE" 6 1 W INDUSTRIES V GREAT ATLANTIC & PACIFIC TEA COMPANY, 426 F. 2D 687, 698.9, CA 2 1973. PRIVATE ACTIONS PROVIDE "A NECESSARY SUPPLEMENT" TO ACTIONS BY THE EEOC, AND "THE POSSIBILI OF CIVIL DAMAGES OR INJUNCTIVE RELIEF SERVES AS A MOST EFFECTIVE WEAPON IN THE ENFORCEMENT" OF LAWS DESIGNED TO PROTECT THE PUBLIC INTEREST. J. I. CASE COMPANY V BORAK, 1966, 377 US. 426, 84 SCT 1555, 1

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, JUDGE MISHLER'S ORDER IN DENYING THE PLAINTIFF/APPELLANT'S APPLICATION FOR A PRELIMINARY INJUNCTION, ENJOINING THE UNLAWFUL EMPLOYMENT POLICIES AND PRACTICE OF THE DEFENDANT/APPELLEE, SHOULD BE REVERSED.

RESPECTFULLY SUBMITTED,

Biswanath Halder
Appellant Pro Se

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DATED : Queens, New York
March 5, 1976

Rec'd Lynda Ozena
March 10, 1976

MEYER, ENGLISH & CIANCIULLI, P.C.

16-1039

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

BISWANETH HALDER,

Plaintiff,

- against -

AVIS RENT-A-CAR SYSTEM, INC.,

Defendant.

- - - - - - - - - - - - - - - - - -x

No. 74-C-1552

Memorandum of Decision and Order

January 22, 1976

MISHLER, CH. J.

The following motions by plaintiff are pending before this court:

(1) to amend his complaint, Rule 15(a) (F.R.Civ.P.);

(2) to reargue this court's decision and order dated June 13, 1975, denying plaintiff's motion to compel defendant to answer certain interrogatories;

(3) for summary judgment, Rule 56 (F.R.Civ.P.); and

(4) to enjoin defendants from continuing their policy of discrimination and order defendant to hire plaintiff.

Defendant has moved to dismiss and for judgment on the pleadings.

I. PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

Plaintiff filed a claim with the EEOC against Avis Rent-A-Car System, Inc. ("Avis"), in 1971. He claimed that Avis failed to interview or hire him because of his national origin (plaintiff was born in India). The EEOC investigated and found no evidence to support the claim. Plaintiff requested a Notice of Right to Sue and then commenced this action. Plaintiff alleged that defendant's failure to interview or hire him was due to plaintiff's national origin and that this discrimination violated 42 U.S.C. §2000e-5.

The present motion is plaintiff's second attempt to amend the complaint.[1] Plaintiff now seeks to add a cause of action under 42 U.S.C. §1981 because of alleged discrimination against him because of his color, religion and alienage.[2] The

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/1 On February 25, 1975, this court permitted plaintiff to add additional dates when defendant allegedly discriminated against plaintiff.

/2 In another action, this court denied a request by plaintiff to amend his complaint to include a cause of action under 42 U.S.C. §1981 because §1981 does not give redress to discrimination because of national origin. Halder v. RCA Corp., 74-C-1375 (E.D.N.Y. April 25, 1975). Since that decision plaintiff's requests to amend his various complaints have all added discrimination because of color, religion and alienage to support his §1981 action.

factual setting out of which this action grew has not changed at all. Plaintiff offers no facts to substantiate these new claims of discrimination. /3

Plaintiff has subjected defendant to charges of discrimination because of plaintiff's national origin since May, 1971, when he filed charges with the EEOC. Defendant has answered to and prepared its case against charges of discrimination based on national origin. Plaintiff has a full and adequate remedy under 42 U.S.C. §2000e-5. Justice will not be hindered by refusing plaintiff's request to amend his complaint.

/3 Plaintiff's original complaint claimed that he was allowed into this country because there was a need for people with his skills. Plaintiff responded to defendant's advertisements with letters and resumes. He received either no response to his letters or letters saying that his resume had been received, but there was no position for a person with his qualifications. Plaintiff contends that defendant had positions available for a person with plaintiff's qualifications and that the only conclusion he could reach was that Avis must have discriminated against him because his name was of Indian extraction. Plaintiff made no mention of color, religion or alienage and now offers no theory as to how defendant might have been able to ascertain plaintiff's color, religion or citizenship in order to discriminate against them.

II. PLAINTIFF'S MOTION TO REARGUE THIS COURT'S ORDER DENYING A PREVIOUS MOTION TO COMPEL ANSWERS TO CERTAIN INTERROGATORIES

This court has decided the propriety of certain of plaintiff's interrogatories once in this action already. The court has also ruled on these interrogatories on several other occasions.[4] Plaintiff has offered no new reasons to change this court's decision and I will not compel defendant to answer plaintiff's interrogatories any more than has already been directed.

III. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS OR FOR JUDGMENT ON THE PLEADINGS

Defendant's motions will be considered as motions for summary judgment as all parties have submitted affidavits and memoranda of law. Rule 12(b) and (c) (F.R.Civ.P.).

The Second Circuit in Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317 (2d Cir. 1975), once again re-

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[4] Plaintiff has many actions pending before this court. Each action mirrors the next. In many of these actions Halder has served upon the different defendants identical sets of interrogatories. In at least two of those actions - Halder v. Sperry Rand Corp., 74-C-1069 (E.D.N.Y. June 12, 1975) and Halder v. Quotron Systems, Inc., 74-C-1376 (E.D.N.Y. June 13, 1975) - this court has issued written decisions and orders denying plaintiff's motion to compel the answers to interrogatories which are oppressive and burdensome.

viewed the requirements for the granting of summary judgment. The court must decide if any genuine issue of fact exists; if so the motion must be denied. Plaintiff submits there are none. Defendant - in a statement, under General Rule 9(g), in opposition to plaintiff's cross-motion for summary judgment, dated September 2, 1975 - has listed nine issues of fact[5] that it submits are still in issue. The court feels that at least some of the items are still very much in dispute. Summary judgment for either side at this point would be inappropriate.

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[5] 1. Whether plaintiff was experienced in the area of Computer Programming;

2. Whether there were available positions for his professional services in the area of his experience;

3. Whether defendant had positions available in plaintiff's area of experience during the time when plaintiff was seeking employment;

4. Whether plaintiff applied for a position with defendant within his area of experience at the times alleged;

5. Whether defendant received plaintiff's application for employment at the times alleged;

6. Whether defendant admitted to the EEOC that plaintiff was qualified for the job he sought but declined to interview him;

7. Whether defendant promised the EEOC to interview the plaintiff in the future if he applied for employment;

IV. PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff has asked this court to enjoin defendant from engaging in employment policies and practices which discriminate against plaintiff and others who are of Indian ancestry. He also requests an order that defendant immediately hire him. The court has the power to issue preliminary injunctions. 42 U.S.C. §2000e-5(g). The Second Circuit has stated that "the two-fold requirement for a preliminary injunction is a demonstration of probability of success on the merits and a showing that irreparable harm will result if such relief is denied." Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., Inc., 476 F.2d 687, 692 (2d Cir. 1973).

Plaintiff asserts that he was allowed into this country because he possessed skills which are badly needed here. He claims that defendant advertised and therefore had positions open for computer programmers and that he was eminently qualified to fill those positions. Yet, when plaintiff applied for jobs with defendant they did not offer him a position. Plaintiff can only draw one conclusion: defendant,

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/5 Cont.

8. Whether defendant ever discriminated against plaintiff based on his national origin or any other basis; and

9. Whether defendant "covered up" the alleged discrimination.

surmising from plaintiff's name that he was Indian, refused to consider him for a job because of its policy of discrimination against Indians.

Defendant offers a second interpretation. It asserts that there were positions available but these positions required skills that plaintiff did not have.

The court will not rule on the merits of the case to determine the propriety of a preliminary injunction. However, the court must decide whether plaintiff has shown a likelihood of success. The court cannot say that defendant's interpretation is less worthy of belief than plaintiff's. Plaintiff asks this court to issue an order requiring defendant to hire plaintiff on the basis of the conclusion of law reached by plaintiff. Plaintiff has not met his burden of showing the likelihood of success which would warrant the issuance of such an order.

The court further notes that the preliminary injunction is often used to maintain the status quo pending final decision on the merits. No relationship between plaintiff and defendant has ever existed. To require defendant to hire plaintiff at this stage of the proceedings would greatly alter the parties' relationship. The court believes that, if plain-

tiff eventually proves his claims, money damages plus appropriate affirmative relief at that point in time will redress any wrongs done to plaintiff.

For the above reasons all motions by plaintiff and defendant are in all respects denied, and it is

SO ORDERED.

U. S. D. J.